SUPREME COURT, U. S.
FILED
JUN 6 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957
No. 947

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,
Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, Deceased,
Appellees

On Appeal from the Supreme Court of Pennsylvania

ANSWER OF CITY, CITY OFFICIALS AND INDIVIDUAL APPELLANTS TO APPELLEES' MOTION TO DISMISS THE APPEAL AND DENY THE WRIT OF CERTIORARI.

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1. Appellants do not contest the proposition, by which appellees appear to set great store, that this Court ordinarily may not and should not review "nonfederal grounds of decision." (*Motion to Dismiss*, p. 14). But the view, which appellees seem to advance, that the Pennsylvania State Supreme Court limited itself in this case to the determination of "questions of state law" (*Motion to Dismiss*, p. 14) would certainly come as something of a shock to the members of that court who joined in Chief Justice Jones' extended exposition of the constitutional problems here

posed. Moreover, this antiseptic view of the State Supreme Court's decision is one which, at a later stage of appellees' brief, appellees themselves have some difficulty adhering to:

> "Once the fog created by appellants' fallacious assumptions is lifted, the basic issues involved in the instant appeal stand out clearly. Those issues are the freedom of testamentary disposition, the independence of private charities, and whether or not the Fourteenth Amendment in fact guarantees the rights claimed by appellants." (*Motion to Dismiss*, p. 40).

2. Thus appellees, in somewhat circuitous fashion, themselves concede that appellants have presented federal questions—questions which turn on "whether or not the Fourteenth Amendment in fact guarantees the rights claimed by appellants". The weighty brief which appellees have filed and which laboriously discusses the federal questions reveals that appellees themselves regard these issues as being substantial. Moreover, this Court has already decreed the substantiality of the questions by having granted certiorari and having reversed the court below in this same litigation. One of the very issues now before this Court is whether the lower courts have, as we contend, misconstrued the order of this Court to the injury of the appellants and this Court has held that the question of the meaning of its mandate raises a substantial question, *Alleghany Corp. v. Breswick*, U. S. , 2 L. Ed. 2d 374, as well as the issues which are appropriately left open to the court below on remand. *Alleghany Corp. v. Breswick*, *supra*. And certainly the importance of clarity in litigation which this Court has hitherto found controlled by *Brown v. Board of Education*, 347 U. S. 483, needs no demonstration.

Moreover, it would seem that where the Attorney General of the Commonwealth comes before this Court and states that what state courts of the state of which he is the chief law official have done violates the federal constitutional rights of Negro appellants and that the insti-

tution involved is still a public institution, the substantiality of the questions presented becomes too clear to require further demonstration.

3. Appellees either ignore or fail to grasp the core of appellants' contentions. According to appellees' brief:

> "Appellants' argument based on *Shelley*, *Barrows*, and *Railway Employes' Dept. A.F.L. v. Hanson*, 351 U. S. 225 (1956) is nothing more than a claim that because the individual appellants have been denied admission to Girard College by the state courts, the Fourteenth Amendment entitles them to admission.
>
> "The individual appellants are claiming that their minority group status transforms a state court adjudication that they have no rights in certain private property into an adjudication whereby the STATE discriminatorily deprives them of property rights."
>
> (*Motion to Dismiss*, p. 46)

But the above has never been appellants' basic position. Their position (apart from the contention that a paper change in trustees cannot in any event affect the fundamental character of an institution which has been essentially public for more than a century) is simply that this Court last year determined that so long as a governmental body administers Girard College, refusal of admission to Negroes *qua* Negroes violates the Fourteenth Amendment, even though the Will which established the College provides for discrimination against Negroes. Appellants submit that the action taken by the Orphans' Court, ousting a governmental body as trustee and denying appellants' admission to Girard College, was state action; that is was state action for the purpose and with the necessary effect of continuing the exclusion of appellants because they are Negroes which this Court held to be unlawful one year ago; and that State action, whether by courts or other state agencies, taken under the guise of "construing" this

Court's mandate which effectuates the exclusion of appellants because they are Negroes merely compounds the initial breach of the Fourteenth Amendment.

Appellees' failure to apprehend and meet appellants' contentions stems from appellees' insistence on starting the constitutional analysis at the point *after* the City of Philadelphia was removed as trustee (*Motion to Dismiss*, pp. 13, 16, 17). But this misses the crux of the case. It was the substitution of new trustees and the reason therefor which is the state action which brings into play the Fourteenth Amendment. In *Shelley v. Kramer*, 334 U. S. 1, this Court held that a state court could not apply its normal contract rules if the result of such an application was to deny the occupancy of land to Negroes on the basis of race; here appellants urge that a state court is prohibited by the Fourteenth Amendment from applying statutes or its common law authorizing the removal of a trustee where the sole and express purpose and result of such removal is to deny to Negro appellants on the basis of race the opportunity to attend Girard College, which opportunity, as this Court held on April 29, 1957, *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230, they possessed prior to the time that the state court sought to apply what it alleges its state rule of law to be.*

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* Despite appellees' statement to the contrary (see *Motion to Dismiss*, p. 24), the overwhelming state authority would lead a court to eliminate the illegal condition, not oust the trustee. See, e.g., Restatement, Trusts §§166, 61; *Toner's Estate*, 260 Pa. 49, 103 Atl. 541 (1918); *Stout v. Stout*, 192 Ky. 504, 233 S.W. 1057 (1921); *Attorney General v. City of Lowell*, 246 Mass. 312, 141 N.E. 45 (1923); *Ruhland v. King*, 154 Wisc. 545, 143 N.E. 681 (1913); *D'Arcangelo v. D'Arcangelo*, 137 N.J. Eq. 63, 45 A. 2d 169 (1945); *Girard Trust Co. v. Schmitz*, 129 N. J. Eq. 444, 20 A. 2d 21 (1941); *Tennant v. Braie, Tothill*, 78, 1649 Ed.; *In Re Haight's Will*, 51 App. Div. 610, 64 N.Y. Supp. 1029 (1900); *In Re Beard*, 1 Ch. 383 (1908). *In Re Dominion Students Hall Trust* (1947) 1 Ch. 183; *In Re Queen's School Chester* (1910) 1 Ch. 796.

Appellees refer with evident distaste (*Motion to Dismiss*, p. 46, n. 13) to appellants' suggestion that had the Board of Directors of City Trusts in the first instance *admitted* appellants, a subsequent Orphans' Court order substituting private trustees and expelling appellants because they are Negroes would have been plainly unconstitutional. Appellees observe that the hypothetical situation "assumes, contrary to the facts of this case, that a trustee will commit a breach of trust" (*Motion to Dismiss*, p. 46, n. 13). Once again, appellees have missed appellants' meaning. The hypothetical situation assumed only that a trustee might elect to comply with the Fourteenth Amendment which is, even as against the Will of Stephen Girard, the supreme law of the land.

That the purpose of the Orphans' Court was to perpetuate the unlawful exclusion of appellants because they are Negroes is, for all practical purposes, acknowledged by appellees:

> "The removal of the city as trustee was necessary, not only to eliminate the state discrimination found on the prior appeal, but also to protect the rights of admission of eligible 'poor white male orphans', whom Stephen Girard selected as the beneficiaries of the Girard College Trust. In the light of the decision of this Court on the prior appeal, the city as trustee could no longer uphold the integrity of the Will and protect the interests of the named beneficiary class. Since there are more eligible poor white male orphans than can be admitted to Girard College,* for every Negro orphan admitted, one member of the beneficiary class selected by Stephen Girard will be denied admission." (*Motion to Dismiss*, pp. 42-43)

Nor is the unconstitutionality of the discriminatory end,

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* The physical capacity of the school is 1,772, but there are only 1,300 students therein (See Jurisdictional Statement, p. 18)

so candidly described, in any way mitigated by appellees' quaint suggestion that, "To continue the City as trustee, with the requirement that it not refuse admission to Negroes, would deprive members of the named beneficiary class of their established rights, solely by reason of their race, in violation of the Fourteenth Amendment." (*Motion to Dismiss*, p. 43). The contention that the equal protection clause *requires continued racial discrimination against appellants because they are Negroes* is as gross a perversion of the manifest purposes of the Fourteenth Amendment as the cognate argument, which this Court rejected, that the Fourteenth Amendment gave constitutional sanction to a labor union's policy of excluding Negroes from membership. *Railway Mail Ass'n v. Corsi*, 326 U. S. 88, 94, 98.

4. The suggestion that the City of Philadelphia and the Commonwealth of Pennsylvania lack standing to raise these constitutional issues comes with ill grace from appellees "substitute trustees", many of whom were, until this Court reversed the Pennsylvania Supreme Court, running Girard College as members of the Board of City Trusts. *A priori*, the interest of the City and the Commonwealth in enforcing the constitutional rights of their citizens is eminently proper. Cf. *Brewer v. Hoxie School District. No. 46*, 238 F. 2d 91 (8th cir. 1956). And the state courts have in this case endorsed the propriety of their participation—especially as to the Commonwealth:

> "There is a serious question as to the right of the City of Philadelphia, acting through the Mayor and the Commission on Human Relations, to appear as a party litigant in this case. However, there is no doubt as to the standing of applicant, William Ashe Foust, nor the Attorney General of Pennsylvania. Accordingly, we have resolved the doubt in favor of the City; we have permitted it to appear; and we have given careful consideration to its position and the oral argument and brief which it presented in support

thereof." 4 Pa. D. & C. 2d 671, 718, fn. 3 (Orphans' Ct., Phila. 1955).

Moreover, the City of Philadelphia certainly has standing to complain of its illegal ouster as trustee of over $100,000,000 of property whcih belongs to it in trust, when such ouster was accomplished by means which violate the federal Constitution. *Barrows v. Jackson*, 346 U. S. 249, 254-260); *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91, 104-5 (8th cir. 1956). Moreover, included in the property is approximately $1,000,000 in assets which are in the Girard Estate but which are not used by the college itself. Of course, all this was accomplished by the Orphans' Court on its own motion and without hearing.

It is submitted that the question is controlled in the instant case by this Court's recognition of the litigant status of all the present appellants when it took jurisdiction of this case a year ago. 353 U. S. 230. Perhaps the appellees' violent objection to the Commonwealth's standing is traceable to the disastrous effect to appellees of the Attorney General's position which with commendable candor concedes that the Negro appellants are still faced with state action which is in violation of the Fourteenth Amendment.

5. The appellants timely raised the question of the constitutionality of the Pennsylvania Fiduciaries Act of April 18, 1949, P. L. 512, Sec. 331 (5), 20 Purd. Stat. Sec. 320.331 (See Jurisdictional Statement, pages 4 through 7).* Moreover, it should be recalled that the Orphans' Court of Philadelphia County never allowed argument, a hearing or even briefs on the issue of its power to remove

* There is not one word in the opinion of the Supreme Court of Pennsylvania that it dismissed appellants' argument on the constitutionality of the Fiduciaries Act of April 18, 1949 because the Orphans' Court had not passed on it. The court in fact passed upon appellants' claim of unconstitutionality.

the City of Philadelphia as trustee, and the City was not removed as trustee *until after* appellants' Petition for Reconsideration and Vacation had been dismissed without argument or hearing.**

6. Appellants properly raised the question whether the ousting of the City of Philadelphia as trustee jeopardizes the interest of the United States as ultimate trustee under the Will of Stephen Girard. If a governmental body, state or federal, cannot be bypassed in favor of private trustees, then it is clear that since a governmental body must continue to operate and direct Girard College, Negro appellants must be admitted thereto. *Commonwealth v. Board of City Trusts*, 353 U. S. 230. If this Court questions whether appellants are capable of fully representing the proprietary interest of the United States in this proceeding, it would seem wholly appropriate for this Court to invite the participation of the Attorney General. Cf. *Brown v. Board of Education*, 347 U. S. 483; *Amalgamated Clothing Workers v. Richman Brothers*, 349 U. S. 600.

CONCLUSION

Despite appellees' protestations to the contrary, this is a case of racial discrimination: state judicial power was utilized voluntarily to perpetuate a deliberate policy of exclusion of Negroes and to alter 127 years of history solely

** Prior to this case, the Supreme Court of Pennsylvania had always held that the Orphans' Court was a Court of limited jurisdiction and could remove a trustee only for reasons set forth in the applicable statute. *Crawford's Estate*, 340 Pa. 187 (1940). "The Orphans' Court is a Court of limited jurisdiction, the extent of which is determined entirely by statute. Any warrant for its actions must be found in the language of the statutes which create and define its powers." *Mains' Estate*, 322 Pa. 243, 246 (1936); *Way Estate*, 379 Pa. 421 (1954).

to thwart the enjoyment of the constitutional rights of Negro appellants declared one year ago by this Court.

Respectfully Submitted,

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June 3, 1958